United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1054

ROBERT MELNICK,

Appellant,

v.

LAWRENCE N. BRANDT,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

APPENDIX

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROBERT MELNICK 8308 Melody Court Bethesda, Maryland Plaintiff, v. LAWRENCE N. BRANDT 7616 Rosdhu Court Chevy Chase, Maryland Defendant.	]]]]]]]]]]]	Civil Action No. 2104-69

COMPLAINT
Broker's Commission

1. Jurisdiction is conferred upon this court by Title 11, Section 521, District of Columbia Code, 1961 Edition. The amount in controversy exceeds the sum of $10,000.00.

2. Plaintiff herein is, and was at all times herein pertinent, a licensed real estate broker in the District of Columbia.

3. In or during September 1965 the defendant herein employed the services of the plaintiff, to act as real estate broker, to effect the sale of the interest of the defendant and one Nathan Landow in and to a contract for the purchase of approximately 711,968 square feet of land located in the District of Columbia and denominated as Parcels 21/30 and parts of Parcels 21/31, 21/38 and 21/32, all of which parcels are known for purposes of assessment and taxation as Parcels 21/45.

4. That as a consequence of the services performed by the plaintiff, the defendant and said Nathan Landow did, in fact, sell their interest in the aforesaid contract for the purchase of the above-described real estate

to one Jerry Wolman, and/or his assigns.

5. That in or during November 1965 the defendant agreed to compensate the plaintiff, as and for his commission in effecting this sale above-described, in the sum of $37,500, to be paid no later than January 10, 1967.

6. That plaintiff has become entitled to a commission of $37,500, in accordance with the agreement of defendant, and that although requested to do so, defendant has failed and refused to pay such commission.

WHEREFORE, the premises considered, plaintiff demands judgment against defendant in the sum of $37,500, together with interest from January 10, 1967, and the costs of this action.

NELSON DECKELBAUM
1140 Connecticut Avenue, N. W.
Washington, D. C.
223-1474
Attorney for plaintiff

[Jurat Omitted in Printing]

[Caption Omitted in Printing]

ANSWER AND COUNTERCLAIM

First Defense

The Complaint fails to state a claim upon which relief can be granted.

Second Defense

1. Admitted.

2. Defendant has no knowledge of the truth of the allegations contained in paragraph 2 but if the same shall prove material to his interests, he demands strict proof thereof.

3-6 inclusive. Denied.

Third Defense

Plaintiff seeks to maintain the above entitled cause contrary to the provisions of §12-301(7,)(8) and §45-1408(n) D.C. Code 1967 edition, both of which effectually bar the right of plaintiff to recover.

Fourth Defense

Any statements or promises of defendant were without consideration and are accordingly unenforceable in this or any other action.

Counterclaim for Malicious Prosecution

Defendant sues plaintiff for $100,000 for malicious prosecution in the issuance and service of certain writs of attachment before judgment, in the form of garnishments before judgment, hereinafter set forth.

1. On or about July 25, 1969, plaintiff caused to be seized and attached certain property of defendant, to wit, money and credits in the sum of $31,587.07 in the hands of Phillip F. Herrick and Nicholas E. Allen, trustees, in case No. 457888 at the District Realty Title Insurance Corporation, 1424 K Street, N.W., Washington, D.C., by writs of attachment before judgment issued out of this court in this cause. Plaintiff on the same day issued writs of attachment before judgment against Benton C. Tolley, Jr., and District Realty Title Insurance Corporation.

2. Defendant avers that said attachment was issued without notice, warning or demand, maliciously and willfully and without just cause or any necessity therefor, for the purpose of forcing defendant to make payment of said sum immediately upon levy of the attachment, not because said sum was due and unpaid but because said amount was involved in the settlement following foreclosure sale of certain land on Massachusetts Avenue, N.W., in the District of Columbia which involved in excess of $5,000,000.

3. Said trustees Herrick and Allen continued to hold said sum due defendant pursuant to the garnishment served upon them but nevertheless proceeded with settlement of said foreclosure sale, a transaction which plaintiff willfully and maliciously sought to impede as a means of obtaining money from defendant.

4. Since 1956 defendant has continously maintained an office in the District of Columbia and been listed in the District of Columbia telephone books. From the period December 1956 to approximately November 1961, the office of defendant was located at 3021 Orchard Lane, N.W., Washington, D.C.; thereafter until 1963 the office of defendant was located at 301 C Street, N.E., Washington, D.C.; thereafter the office of the defendant was located at 1601 18th Street, N.W., Washington, D.C., until June of 1966 when defendant moved to 4201 Connecticut Avenue, N.W. Washington, D.C. where he has since said date continuously maintained and still maintains his office for the transaction of business.

5. Defendant has been a resident of the District of Columbia for many years but in 1961 defendant moved his residence

to 7616 Rosdhu Court, Chevy Chase, Maryland, a few miles north of the District line in Chevy Chase, which fact of non-residence plaintiff willfully and maliciously and without just cause or any necessity therefor, sought to use to his own profit in the levy of said attachment before judgment.

6. Defendant avers that he holds title free and clear to certain real estate located at Edgevale Terrace and Rock Creek Drive, N.W., in the District of Columbia worth approximately $100,000; that he holds title to premises known as Walter Reed Inn, 6825 Georgia Avenue, N.W., in the District of Columbia, a large and prosperous motel recently completed containing 54 rooms and fully furnished, subject only to a mortgage of, to wit, $430,000 held by Acaia Mutual Life Insurance Company, in which defendant avers he has an equity of approximately $600,000; that defendant holds title jointly with Raymond Gerber to a 107 unit apartment house at 2829 Connecticut Avenue, N.W., in the District of Columbia, of a value of approximately $1,500,000, subject to a mortgage of $1,150,000 in which project defendant owns approximately 12-1/2% interest; that defendant holds title with Raymond Gerber and another to premises 5406 Connecticut Avenue, N.W in the District of Columbia, consisting of 63 unit apartment building of the value of approximately $1,600,000 subject to a mortgage of $950,000 having an equity of $650,000 of which defendant is the owner of approximately 8-1/3%; that defendant together with one Chester Jones and Raymond Gerber holds title to approximately 63,000 square feet of office space included within the building known as Freudberg Building at 4201 Connecticut Avenue in the Dsitrict of Columbia which has value of approxi-

mately $2,000,000 subject to a mortgage of approximately $1,600,000 and in which defendant has approximately 10% interest.

7. Defendant has been doing business in the District of Columbia for many years, and is now and has for many years last past been readily available at all times for service of process in the District of Columbia and has now, and for many years last past has had ample assets in the District of Columbia openly available for the execution of any judgment which may ultimately be obtained against him in any action, all of which is and has been well-known to plaintiff.

8. As a result of the service of said garnishment, defendant has been denied the use of the funds so attached since July 25, 1969, and will continue to be denied the use of them until the disposition of this action, or will otherwise be compelled to incur the expense of a forthcoming bond. Further, defendant has been humiliated and embarrased and has been compelled to expend monies for service of attorneys.

WHEREFORE, premises considered, defendant demands that judgment be entered in his favor upon the complaint and against plaintiff in favor of defendant upon the counterclaim for compensatory and punitive damages in the amount of $100,000 besides costs, and for such other relief as the Court may deem meet and proper.

KING & NORDLINGER

Lawrence N. Brandt

By Bernard I Nordlinger

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[Certificate of Service Omitted in Printing]

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MOTION OF DEFENDANT FOR SUMMARY JUDGMENT ON THE COMPLAINT

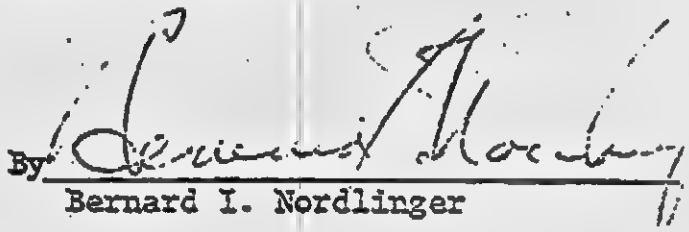
Comes now the defendant Lawrence N. Brandt by his attorneys, King & Nordlinger, and moves for summary judgment in his favor in the above entitled cause on plaintiff's Complaint for the following reasons:

1. Plaintiff claims that defendant in November, 1965 orally promised to pay plaintiff a real estate sales commission in January of 1966. Plaintiff did not institute this action until July 25, 1969, more than three years from the date upon which plaintiff claims defendant orally undertook to make payment, or the due date of said payment. Hence this action is barred under §12-301(7)(8) D.C. Code 1967 ed.

2. Plaintiff claims no written engagement from defendant to proceed with the sale of the property for which plaintiff claims the real estate sales commission, in violation of the District of Columbia real estate act §45-1408(n), D.C. Code 1967 ed.

And for other reasons to be made apparent at the hearing hereof.

KING & NORDLINGER

By 
Bernard I. Nordlinger

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STATEMENT OF DEFENDANT UNDER U.S. DISTRICT COURT RULE 9(h)

Comes now defendant Lawrence N. Brandt by his attorneys, King & Nordlinger, and pursuant to the requirements of U.S. District Court Rule 9(h), states material facts claimed by plaintiff and concerning which there can be no genuine issue of material fact

made by plaintiff, as follows:

1. Plaintiff is a real estate broker authorized to carry on a real estate brokerage business in the District of Columbia. (Plaintiff's deposition page 3, hereafter referred to as "P.D.")

2. That in or during November, 1965, defendant agreed to compensate plaintiff as and for plaintiff's commission in effecting a sale of a real estate contract owned by defendant and one Nathan Landow, by payment of the sum of $37,500. (Plaintiff's complaint paragraphs 3, 4, 5.)

3. Plaintiff was not engaged by Mr. Brandt to sell the real estate contract (P.D. 8). Plaintiff was engaged by one Arthur Hillman (P.D. 9). Plaintiff was not engaged in writing by Mr. Brandt nor by Mr. Hillman (P.D. 9, 10). Mr. Hillman made the arrangements for plaintiff to present the possibility of sale to one Wolman on or about September 24, 1965 (P.D. 10).

4. Before plaintiff went to see Mr. Wolman, plaintiff had no conversation with Mr. Brandt to obtain authority to sell the property and had no conversation with one Nathan Landow, the other owner. (P.D. 13, 14.)

5. Before the settlement of the sale of the real estate contract, plaintiff had a conversation with defendant, at which time defendant asked plaintiff to let the contract be signed and that after the contract was signed, defendant would make arrangements to take care of plaintiff. (P.D. 15.)

6. After the contract was signed, about October 19 or 17, 1965, Mr. Hillman, plaintiff and defendant had a meeting at which time defendant agreed to pay plaintiff and Hillman a $37,500 commission (P.D. 16), of which plaintiff is entitled to one-half

and Mr. Hillman is entitled to one-half (P.D. 17); and plaintiff is entitled only to $18,750 (P.D. 18).

7. Payment was to be made at the time of settlement of the sale of the contract of Landow and defendant in December, 1965. It was then that defendant was to pay plaintiff $37,500 (P.D. 19). Defendant, after the money for the sale of the real estate contract "passed in December," 1965, asked plaintiff to wait "until the first payment on the contract was made which was to be some time in January of 1966", before making payment (P.D. 20,21). Plaintiff took the arrangements to mean that defendant became obligated to pay plaintiff in December, 1965, made a demand upon defendant who told plaintiff he would pay it in January of 1966, and later defendant said he would make the payment in January of 1967. All of the arrangements were oral, never in writing (P.D. 23).

8. The only time expended by plaintiff in connection with the effort to sell the contract was a "two-hour conference with Mr. Teplin and several telephone conversations with" defendant (P.D. 31).

KING & NORDLINGER

By _____

Bernard I. Nordlinger
419 Southern Building
Washington, D.C. 20005
783-1151
Attorneys for Defendant

[Caption Omitted in Printing]

POINTS AND AUTHORITIES IN SUPPORT OF MOTION OF DEFENDANT FOR SUMMARY JUDGMENT ON PLAINTIFF'S COMPLAINT

This Motion for Summary Judgment is appropriate for presentation to the Court at this time, even though the above

entitled cause has been placed upon the ready calendar as of December 29, 1969. U.S. District Court Local Rule 11(f) permits a Motion for Judgment to be filed and accepted by the Clerk even after the action is placed on the ready calendar.

Defendant's statement under Rule 9(h) of this Court establishes beyond doubt that plaintiff claims an oral contract of the defendant which plaintiff did not seek to place in suit within three years from the date the obligation is alleged to have become due. The Statute of Limitations, §12-301(7)(8), D.C. Code 1967 ed. limits the period to three years. This the plaintiff ignored in the institution of his complaint. The situation in the case at bar is no different from that in which a promissory note becomes due on one day and the maker orally promises the holder to pay at a later time. Under such circumstances the holder must bring suit within three years from the date the note became due, not within three years from the date on which the maker promised later to make payment.

Further, the statement of plaintiff in his own deposition shows that he had no written authority to submit the contract for sale, in violation of the District of Columbia real estate law, §45-1408(n).

"Under our law no broker may offer property for sale or rent without written consent of the owner or his authorized agent,' said the District of Columbia Municipal Court of Appeals in Coldicutt v. W.C. & A. N. Miller Development Company, 47 A. 2d 518. In so holding the court was interpreting the District of Columbia "Real Estate and Business Brokers' License Act" enacted by the Congress on August 25, 1937 (50 Stat. 787, Chap. 60) §45-1401-1418.

D.C. Code, 1967 ed.

Under the statute in question, it is "unlawful in the District of Columbia for any person, firm * * * or corporation * * * to act as a real estate broker * * * without a license issued by the Real Estate Commission of the District of Columbia." (Sec. 1401) Such license may thereafter be revoked by the Commission if it appears that the borker has "placed a sign on any property offering it for sale or rent without the written consent of the owner or his authorized agent." (Sec. 1408(n)) The act also provides that "any person * * * violating any provision of this chapter" (i.e. of the Act) may be punished by a fine of $500 and/or imprisonment not exceeding six months; and that if the offender is a corporation it may be punished by a fine of not more than $1,000 (Sec. 1416).

The plaintiff broker had no written listing from defendant or his authorized agent to offer for sale the contract for sale of which plaintiff is here claiming a commission. Plaintiff in this case is therefore claiming a commission for acts done in violation of the above mentioned statute.

It will be doubtless contended by plaintiff that the legal proscription against a broker's selling or renting property without a written listing affects only his right to keep his brokerage license, and that the broker's right to recover a commission is unaffected by his own violation of the law. Such in fact, has been the holding of the Municipal Court of Appeals for the District of Columbia, in Murphy v. Mallos, 59 A. 2d 514, and in Shaffer v. Berger, 81 A. 2d 469.

It is submitted, however, that decisions of the Municipal

Court of Appeals above referred to are contrary to specific principles of law enunciated by our United States Court of Appeals for the District of Columbia, and that such decisions should be therefore ignored by this court.

In Hartman v. Lubar, 77 U.S. App. 95 (1942), the Court of Appeals said:

> "The general rule is that an illegal contract, made in violation of a statutory prohibition designed for police or regulatory purposes, is void and confers no right upon the wrongdoer."

Our Court of Appeals has held that in determining whether or not a contract made in violation of a licensing statute is void, the court must determine whether the statute is designed for revenue purposes or whether it was enacted for a regulatory purpose under the police power. If the statute is simply designed to raise revenue, a contract made in violation of its provisions is not void; but if the statute is designed "for police or regulatory purposes" the contract "is void and confers no right upon the wrongdoer." Lloyd v. Johnson, 45 App. D.C. 322 (1916).

See also Hartman v. Lubar, supra.

In Lloyd v. Johnson, supra, the question presented to the court was whether or not a real estate broker who had not obtained a license to act as such, could recover a commission on a sale for which he was the procuring cause. The court pointed out that the statute requiring licensing of real estate brokers was simply a part of the general revenue act for the District of Columbia. The provision for such license came under the general head of "License Taxes" in which as the court said:

> "* * * taxes similar to the one imposed upon real estate brokers or agents are imposed

> upon auctioneers, commission merchants, cattle dealers, ticket brokers, hotel keepers, fortune tellers, hucksters, peddlers, bill posters, pawn brokers, second-hand dealers, and upon persons engaged in fifty other occupations."

In the Lloyd case the court permitted the real estate broker to recover his commission because, as the court said, "The act placed no inhibition on the business in this District." But elsewhere in its opinion (p. 329) the court said:

> "It is clear * * * that a distinction is deemed to exist between a case like the present, where only the collection of revenue is involved, and the case * * * where the ordinance was primarily a police regulation * * *.
>
> * * * * *
>
> "* * * If the statute seeks only the collection of revenue * * * there can be no doubt as to its purpose and meaning, but when * * * it is the design of the law making power to protect the public from fraud in the contract for the promotion of some object of public policy, the contract is then prohibited." (p. 330; underscoring supplied.)

In 1937 Congress enacted a "Real Estate and Business Brokers License Act" for the District of Columbia which is a very different law from the one that was before the court in Lloyd v. Johnson, supra. The House Committee for the District of Columbia, in reporting the bill which became the 1937 act, said:

> "The need for a law regulating the conduct of real estate businesses has long been recognized in the District of Columbia. * * *
>
> "The bill has been so drawn that no one who is competent and honest will be denied the right to engage in the real estate business but on the other hand if any person licensed or applying for license has been guilty of improper practices contrary to the public welfare, their further operation can be prevented. * * *
>
> "* * * A majority of states have enacted laws for the public protection against incom-

> petent or unscrupulous real estate operators. [This bill] is similar to laws now in force in 28 states. * * *
>
> * * * * *
>
> "This bill is intended, therefore, to prevent as well as to punish fraud. The penalties provided by the bill, in addition to the denial of or revocation of license, are a fine of not more than $500, or imprisonment for not more than six months, or both, in the case of an individual. For a corporation, a fine of not more than $1,000 is provided, with individual penalties for officers, agents, or employees, of such corporation.
>
> House Report #878, 75th Congress, 1st Session on H.R. 6593.

After the bill was enacted into law, certain amendments not material for our present purposes were made to the act in 1939. At that time the House Committee in reporting the bill recommending the amendments, said:

> "Inasmuch as this law is a regulatory measure, the Commissioners feel that it should not be used as a tax measure."

It is clear therefore from the legislative history of the act in question that it falls within the class of statutes referred to in Lloyd v. Johnson, supra, where "It is the design of the law-making power to protect the public from fraud in the contract for the promotion of some object of public policy." In such a case, as the court said in Lloyd v. Johnson, supra, "the contract is then prohibited."

In reaching a contrary view in Murphy v. Mallos and in Shaffer v. Berger, supra, the Municipal Court of Appeals has apparently assumed that it could not read a punitive provision into §45-1403(n) which is the section proscribing sales or leases

without a written listing. But it is obvious that the Municipal Court was led into error on this point by its failure to consider the legislative history of the 1937 licensing act. As we have noted from the Report of the House Committee which submitted the bill "the penalties * * * in addition to the denial of or revocation of license are a fine of $500, imprisonment * * * etc." In other words, it is clear from the legislative history of the act that the penalities for a violation of the listing restriction found in §45-1408(n) include fine or imprisonment under the provisions of §45-1416. In fact the last mentioned section, by its own terms, applies to a person or corporation who violates "any provision" of the act.

It is immaterial that §45-1408(n) does not specifically prohibit the selling of property by a broker without a written listing; for in Lloyd v. Johnson, supra, the court said "the inhibition * * * [is] equally effective * * * [when] only the penalty has been attached, for the prohibition in such case must follow by implication." Likewise it is immaterial that the section does not specifically declare a contract made by a broker without a written listing to be void; for our Court of Appeals follows the majority rule which holds that where a police statute incorporates criminal sanction for its violation, it impliedly declares that a contract in violation of such statute is void.

See Anno. 55 A.L.R. 2d 451

Harris v. Runnells, U.S. Supreme Court, 12 How. 79, 13 L. Ed. 901 (1851)

Miller v. Ammon, 145 U.S. 421, 36 L. Ed. 759 (1891)

Any doubt which may have previously existed on this

subject in the District of Columbia was removed by the United States Court of Appeals in Hartman v. Lubar, 77 U.S. App. D.C. 95, 133 F. 2d 44 (1942). There the court was considering an attempt by an unlicensed lending company (through its president) to enforce a deed of trust securing a loan which bore interest at more than 6% per annum. The statute in question (Sec. 26-601) makes "it unlawful and illegal to engage in the District of Columbia in the business of loaning money upon which a rate of interest greater than six per centum per annum is charged on any security of any kind * * * without procuring a license * * *." (Note: The language of the Real Estate Broker's License Act, §45-1401, is strikingly similar. That statute provides "It shall be unlawful in the District of Columbia for any person, firm * * * or corporation * * * to act as a real estate broker * * * without a license * * *").

In Hartman v. Lubar, the Court denied recovery upon the contract sued on. It said:

> "The Act makes it 'unlawful and illegal to engage in the District of Columbia in the business of loaning money upon which a rate of interest greater than six per centum per annum is charged on any security of any kind, direct or collateral, tangible or intangible, without procuring license * * *'. If the disputed loan was made by one who was engaging in the business of lending money in violation of the law, and if the loan was made in the course of that business, then it constituted an illegal contract. The general rule is that an illegal contract, made in violation of a statutory prohibition designed for police or regulatory purposes, is void and confers no right upon the wrongdoer. * * *" (Underscoring added)

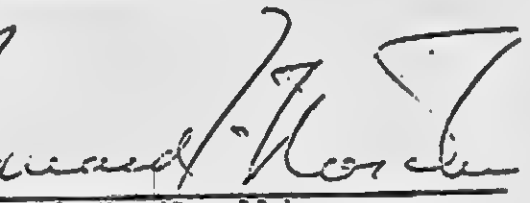
To the same effect see Royal v. Yudelevit, 106 U.S. App. D.C. 1, 3 (1959).

Inasmuch as plaintiff's alleged oral contract with defendant upon which plaintiff claims a right to a commission in this case was a contract "made in violation of a statutory prohibition designed for police or regulatory purposes," such alleged contract "is void and confers no rights upon the wrongdoer."

For the foregoing reasons, summary judgment in favor of Defendant should be granted against plaintiff on plaintiff's complaint, leaving for adjudication herein plaintiff's liability and that of his surety on his attachment bond and defendant's counter-claim.

Respectfully submitted,

KING & NORDLINGER

By 

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MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Comes now the plaintiff, Robert Melnick, and in opposition to defendant's Motion for Summary Judgment, refers to the Statement of Genuine Issues, the depositions filed herein, the affidevit of Arthur J. Hillman, all of which raise genuine issues of fact, and further states as follows:

1. The fact that plaintiff, as a licensed real estate broker, had no written listing for the defendant does not preclude his recovery for real estate commission. This principal oflaw has been long established, without

contradiction, in the body of District of Columbia law. In 1951, the then Municipal Court of Appeals for the District of Columbia, in affirming a business chance broker's entitlement to commission for obtaining a purchaser for a dry cleaning store, even though he had no written listing, stated:

> "It is argued that to allow a commission when the authority to sell is not in writing would be against public policy, but the public policy declared by the statute is that the broker's license may be suspended or revoked if he violates the statute, not that the broker shall be deprived of his commission. We do not believe we are authorized to extend the act beyond its plain provisions. Moreover, we believe that, having agreed to the sale and to the commission, defendant is estopped from denying his obligation." (Shaffer v. Berger, 81 A.2d 469; underscoring supplied.)

The ruling in Shaffer was based upon the enunciation of the law which had been set forth in Murphy v. Mallos, 59 A.2d 514, 1948, where the same court held:

> "Should plaintiff broker be permitted to recover his commission in view of his admission that he offered the property for sale without first having obtained a written listing? The Code 1940, §45-1408 provides that a broker who does so may suffer a suspension or revocation of his license; and such a suspension was imposed in this case.
>
> "It should be noted that the preceding section, 45-1407, expressly requires that a broker suing for a commission must allege and

prove that he was duly licensed. There is a great difference between the two sections. One, which covers licenses, prescribes punitive measures which may be invoked by the Real Estate Commission, and also bars a suit for commission by the broker unless he alleges and proves that he was duly licensed. The other, with which we are here concerned, sets out sixteen acts (including offering property for sale without the written consent of the owner) which shall constitute grounds for suspension or revocation of a license. The section says no more than that. It does not say that a broker who offers property for sale without the owner's written consent shall lose his right to a commission. We have no right to read such additional punitive provision into the section." (underscoring supplied)

The argument advanced by defendant that the Municipal Court of Appeals was "led into error" is untenable in light of the long standing decisions above cited, and especially since there has been absolutely no change in the language of the statute. All of the cases cited by defendant in his memorandum deal with "licensing" as such, and not with the issues presented by this case.

2. Defendant's argument that the cause of action is barred by the statute of limitations is not substantiated by the facts of this case, and a genuine issue has been raised in connection therewith. The affidavit of Mr. Hillman sets forth that when the agreement was reached, in his presence, the defendant agreed to pay the commission in January 1967, at the time when Mr. Wolman was required to make his final payment to satisfy the deferred

purchase money due to defendant and his partner. Defendant had made a profit of $800,000.00 in several months by selling the contract to purchase the Massachusetts Avenue property to Jerry Wolman. He had originally agreed to pay a commission of $75,000.00 to one of the former owners, Ned Bord, for a contemplated sale to Blake/Bender at the same price, producing a $800,000.00 profit less commission. In early 1966, the defendant acknowledges receiving a letter from the plaintiff, of which he states "and when I got it I threw it away." That letter contained the following language:

> "Please sign the copy of this letter and return to me which will signify that you owe me a commission of $37,500.00, which is due and payable on January 10, 1967, or earlier if you receive your final payment from Jerry Wolman before January 10, 1967, on this sale."

In addition, it is clear that a binding promise by the holder of an obligation to extend the time for payment or not to press for payment tolls the statute of limitations.

3. For such other reasons as will be brought to the attention of the Court upon the hearing of this motion.

WHEREFORE, the premises considered, plaintiff prays that the defendant's Motion for Summary Judgment be denied.

/s/

NELSON DEUTSCHMAN
1140 Connecticut Avenue, N.W.
223-1474
Attorney for plaintiff

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STATEMENT OF GENUINE ISSUES

1. Defendant and Nathan Landow, as co-partners, owned the contract to purchase a large tract of land on Massachusetts Avenue, N.W., having purchased said contract from a group headed by a Mr. Ned Bord in approximately May 1965, for a price of $5,300,000.00.

2. Defendant and his partner then negotiated a sale of this property through Mr. Bord as broker, to Blake Construction Co. and/or the Bender brothers, for $800,000.00 over the $5,300,000.00. Under this proposed sale, a commission of $75,000.00 was to be paid to Mr. Bord. The sale never materialized as the prospective purchasers changed their minds just prior to the execution of contracts.

3. Defendant subsequently authorized Arthur J. Hillman, an attorney and friend of plaintiff, to have the plaintiff, a licensed real estate broker in the District of Columbia, present the property to Jerry Wolman as a prospective purchaser. Defendant, pursuant to this authority, gave Mr. Hillman a plat and some written notes concerning the financial details of the sale of the contract.

4. The plaintiff, upon the advice of Mr. Hillman, and in his presence, presented the deal to Mr. Sidney Teplin, who was Mr. Wolman's business associate. At this time the plat was shown to Mr. Teplin and Mr. Wolman was contacted by long distance telephone call. It subsequently developed that defendant's partner, Mr. Landow, consulted directly with Mr. Wolman and made a tentative deal for the sale of the contract at the price of $800,000.00 over the $5,300,000.00 price they had paid, being the same deal

as had previously been negotiated with Blake/Bender.

5. Mr. Wolman actually executed a contract of sale with defendant and his partner only after he had been assured by defendant that plaintiff's commission would be provided for.

6. Defendant subsequently agreed, in or about October 1966, in the presence of plaintiff and Mr. Hillman, to pay a commission of $87,500.00 to plaintiff, payable no later than January 1967, which was the time set for Mr. Wolman to make the final payment on the deferred purchase price of the contract.

NELSON DECKELBAUM
1140 Connecticut Avenue, N.W.
223-1474
Attorney for plaintiff

[Caption Omitted in Printing]

AFFIDAVIT

DISTRICT OF COLUMBIA, ss:

ARTHUR J. HILLMAN, being first duly sworn on oath, deposes and states as follows:

1. That I have been a member of the bar of this court since 1934 and presently maintain an office for the practice of law at 1140 Connecticut Avenue, N.W., Washington, D. C. My practice is limited to mortgage financing and real estate transactions.

2. That the defendant herein, Lawrence N. Brandt, was well known to me during the summer of 1965, and we communicated with one another frequently, for both business and social purposes. On prior occasions the defendant had asked me for assistance with my clients, who were mort-

gage brokers, in obtaining mortgage financing. One of my clients did arrange mortgage financing for the defendant.

3. I was aware of the fact that the defendant was a partner of one Nathan Landow as the contract owners of a tract of unimproved real estate on Massachusetts Avenue, NW., having purchased the said ground from a group of investors headed by one Mr. Ned Bord. I was also familiar with the fact that defendant and his partner were negotiating for the sale of their contract right to the property, through Mr. Bord as broker, to the Blake Construction Company, or the Bender brothers, the principals of that company. The defendant had informed me of the pendency of the negotiations with Mr. Bord and that it was agreed that Mr. Bord was to receive a $75,000 commission in the event the sale was consummated to Blake and/or the Bender brothers. I was also informed by the defendant that the Blake/Bender deal had fallen through. At that time I informed the defendant that the plaintiff, who was a long time client of mine, was a very close friend of Jerry Wolman and was instrumental, as a broker, in buying and selling most of Mr. Wolman's real estate properties; and that if he, the defendant, was so desirous, I would have the Massachusetts Avenue property presented to Mr. Wolman through the plaintiff. The defendant indicated that he would be happy if some fruitful arrangements could be made with Mr. Wolman through the efforts of Mr. Melnick, and gave me a plat of the property and a yellow sheet of paper containing data of the mechanics of the original sale to Blake/Bender. The defendant knew that the plat and data which he had furnished to me were going to be turned over to Mr. Melnick, who in turn would take the matter up with Mr. Wolman.

4. I subsequently did, in fact, deliver the documents to the plaintiff and related to him the discussions that I had had with the defendant, together with my knowledge of the history of the attempted sales of the property. I met Mr. Melnick at the office of Sidney Toplin, at 8055 16th Street, Silver Spring, Maryland, and delivered the documents to him, the plaintiff, in Mr. Toplin's office. It was well known that Mr. Toplin was a close business associate of Mr. Wolman and that he was acting on behalf of Mr. Wolman in discussing the purchase of the Massachusetts Avenue property

5. Mr. Toplin made a long distance telephone call to Mr. Wolman during the course of that meeting, which conference was in my presence.

6. I subsequently learned, through the defendant, that Mr. Wolman had agreed to purchase the defendant's contract on the property, as a result of some negotiation that was held with Mr. Landow, the defendant's partner.

7. I subsequently attended a meeting, as Mr. Melnick's counsel, at the defendant's office. Also present at this meeting was the defendant's partner, Mr. Landow. At that meeting there was a dispute with Mr. Landow as to his obligation to pay a commission to the plaintiff. Later, out of the presence of Mr. Landow, the plaintiff indicated that he would not sue to break up Mr. Wolman's deal, because of their relationship, and the defendant stated that if the plaintiff permitted the deal to actually close that he, the defendant, would see that some arrangements were made to have the plaintiff's commission paid.

8. Subsequently, I attended a luncheon meeting with plaintiff and defendant at the Mayflower Hotel, during which meeting the defendant agreed to pay a commission to the plaintiff of $37,500. The defendant agreed to mak

the payment on the date that the last payment was due from Mr. Wolman on th deferred purchase money, which had been set for January 1967. At no time did the defendant agree to pay any of the $37,500.00 to me, although he was aware of the fact that Mr. Melnick was indebted to me in some amount. The entire $37,500.00 was an obligation due from Mr. Brandt to the plaintiff as broker, and arrangements between the plaintiff, my client, and me as to fees to be paid to me was not known to Mr. Brandt, nor was it of any importance to him.

ARTHUR J. HILLMAN

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OBJECTIONS TO FORM OF PROPOSED ORDER AND MOTION FOR RECONSIDERATION

Comes now the plaintiff, Robert Melnick, by and through his counsel, Nelson Deckelbaum, and objects to the form of the Proposed Order Granting the Motion for Summary Judgment and moves this Court for reconsideration of its ruling of May 19, 1970, and asserts the following as reasons therefor:

1. That a question of fact has been raised pursuant to the Affidavit of Arthur J. Hillman filed in these proceedings in support of plaintiff's Memorandum in Opposition, in which Mr. Hillman states that "The defendant agreed to make the payment on the date that the last payment was due from Mr. Wolman on the deferred purchase money, which had been set for January 1967." Since this question of fact has been raised, it would appear unwarranted for the Court to decide that issue of fact without hearing testimony from all of the witnesses at trial on the merits.

2. The Court would be required to rule, at the hearing on the merits, whether the defendant is estopped or has waived his right to rely on the statute of limitations.

3. Assuming arguendo that the Court has accepted the defendant's view of the facts, it would appear that the evidence raises sufficient questions concerning the acknowledgement or new promise to remove the operation of the statute of limitations, since the evidence would reflect that there had beer an acknowledgement by the defendant of a subsisting debt. In addition, the law is clear that a binding promise by the holder of an obligation to extend the time for payment or not to press for payment tolls the statute of limitations. The facts surrounding this argument must be determined at a hearing on the merits and should not be dismissed by a motion for summary judgment.

4. Rule 56(d), Federal Rules of Civil Procedure, requires the Court to enter an Order specifying the facts which appear without substantial controversy, etc. It is submitted that the Proposed Order fails to meet this requirement.

5. Rule 54(b), Federal Rules of Civil Procedure, requires an express determination that there is no just reason for delay and an express direction for the entry of judgment. The Proposed Order fails to meet this requirement, and would not permit the plaintiff to take an immediate appeal from this ruling.

6. That it is manifestly unfair to grant partial summary judgment in this case insofar as the defendant has a counterclaim pending arising out of this transaction, and the ruling of May 19, 1970, precludes the hearing of the merits of the case.

WHEREFORE, the plaintiff prays that the Court reconsider its granting of motion for summary judgment; and if not, that the Proposed Order be amended in accordance with the applicable Federal Rules.

NELSON DECKELBAUM
1140 Connecticut Avenue, N. W.
223-1474
Attorney for plaintiff

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MEMORANDUM OF DEFENDANT IN OPPOSITION TO OBJECTIONS OF PLAINTIFF TO PROPOSED ORDER AND IN OPPOSITION TO MOTION OF PLAINTIFF FOR RECONSIDERATION

1. No question of fact has been raised by the Affidavit of Arthur J. Hillman. The statements of plaintiff himself to which reference was made in defendant's motion for summary judgment show the facts he claims occurred to form the contract in suit. Hence, it is clear that the Statute of Limitations had run on plaintiff's claim when the suit was filed.

2. No estoppel can possibly be held to bar defendant's reliance upon the Statute of Limitations. If it be taken to be a fact that defendant promised to pay plaintiff in January of 1967, after having prior thereto promised to pay plaintiff on other occasions, and since all of the alleged promises of defendant were verbal, none written, then plaintiff still had ample time after January, 1967 before the bar of the Statute of Limitations interposed, to initiate the action. "If ample time to file suit within the statutory period exists after the circumstances inducing delay have ceased, there is no estoppel against pleading the bar of the statute". Property 10-F, Inc. v. Pack & Process,

Inc. -A.2d- (D.C.App. No. 4977 decided May 5, 1970). In the case at bar "the 'lulling' period ceased in" January, 1967, "and there was ample time thereafter in which to bring suit within the statutory time. Under such circumstances the defense of the statute of limitations was not barred". Property 10-F, Inc., supra.

3. No written "acknowledgement or new promise" appears from plaintiff's view of the facts. Hence, no trial on the merits of the case at bar is necessary.

4. F.R.Civ.P. 56(d) has been fully complied with in the proposed order.

5. F.R.Civ.P. 54(b) may result in a final appealable judgment for defendant only if within the discretion of the Court that result is appropriate. If plaintiff desires to appeal, plaintiff may do so after a ruling on defendant's counterclaim. No immediate appeal would seem to be required under the circumstances of the case at bar.

6. Plaintiff says "that it is manifestly unfair to grant partial summary judgment in this case", but no reason is made to appear why it is unfair to enter judgment for defendant on plaintiff's complaint when it appears beyond peradventure of doubt that plaintiff has no case. If after a final disposition of the case at bar plaintiff should appeal, full relief can be granted plaintiff if it be determined on appeal that the Trial Court was in error in its ruling. Such an event appears hardly to be likely. Indeed, a fair consideration of plaintiff's entire case indicates the strong probability that if it is taken to the

Circuit Court of Appeals, the appeal would be held to be frivolous.

Respectfully submitted,

KING & NORDLINGER

By: /s/ Bernard I. Nordlinger
Bernard I. Nordlinger

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ORDER FOR SUMMARY JUDGMENT FOR DEFENDANT ON COMPLAINT

Upon consideration of the motion of defendant, Lawrence N. Brandt, for Summary Judgment in his favor on plaintiff's complaint, the Points and Authorities in Support thereof and in Opposition thereto and upon oral argument thereon in open court on May 19, 1970 by counsel for plaintiff and defendant, it is by the Court this 2d day of ~~May~~ JUNE, 1970,

ORDERED, that the motion of defendant Lawrence N. Brandt for summary judgment in his favor on plaintiff's complaint be, and the same hereby is, sustained;

FURTHER ORDERED, that defendant's counterclaim against plaintiff be, and the same hereby is, restored to the pre-trial calendar of this Court for pre-trial and trial in due course, subject to the rules of this Court.

/s/ Howard Corcoran
JUDGE

[Certificate of Service Omitted in Printing]

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STIPULATION FOR DISMISSAL OF COUNTERCLAIM

It is hereby stipulated by and between the parties hereto, through their respective counsel of record, that defendant Lawrence N. Brandt sustained the following costs and damages as a result of the suing out of the attachment before judgment by plaintiff, Robert Melnick, in the above-entitled cause:

(a) Fee paid for letter of credit, American National Bank	$ 675.00
(b) Bond premium, Alton Insurance Agency	400.00
(c) Interest, 6% on $31,587.07 from July 25, 1969, to October 10, 1969	394.84
(d) Attorneys' fees, King & Nordlinger	750.00
TOTAL	$2,219.84

Further stipulated that a judgment in favor of defendant against plaintiff and the surety on the bond of plaintiff heretofore filed herein under §16-501(e), D. C. Code (1967 ed.) shall be entered in the above-entitled cause in the amount of Two Thousand Two Hundred Nineteen Dollars and Eighty-four Cents ($2,219.84) with interest from date of judgment, besides costs of this action, at such time as the judgment in favor of defendant against plaintiff on plaintiff's Complaint shall become final, and thereafter, at the expiration of the time for the taking of an appeal or the final disposition of any appeal taken; but in case of appeal, only if final disposition thereof shall be in favor of defendant, or if any appeal results in a reversal for trial, then only if final

judgment upon re-trial shall be in favor of defendant, not reversed on further appeal. Provided, however, that plaintiff reserves the right to deny the propriety of the inclusion of attorneys' fees and interest thereon in said judgment.

It is further stipulated in consideration of the foregoing that the Counterclaim of defendant shall be dismissed, with prejudice.

IN WITNESS WHEREOF, counsel for the respective parties hereto have executed the foregoing Stipulation on this day of December, 1970.

NELSON DECKELBAUM
1140 Connecticut Avenue, N. W.
Washington, D. C. 20036
223-1474
Attorney for plaintiff

KING & NORDLINGER

By: _____
BERNARD I. NORDLINGER
419 Southern Building
Washington, D.C. 20005
783-1151
Attorneys for defendant
Lawrence N. Brandt

APPROVED:

_____
Plaintiff

_____
Defendant

[Caption Omitted in Printing]

Washington, D. C.

Thursday, September 4, 1969

Deposition of LAWRENCE N. BRANDT

* * *

Q And when you finally executed a contract with Mr. Bord and his associates what was the price?

A Five million three.

Q Which was two million dollars in excess of his contract price?

A That's correct.

Q Now, did you have an actual settlement at a title company when you purchased the contract from Mr. Bord?

A Yes.

* * *

Q Was there any broker involved in that particular transaction?

A Yes, Ned Bord.

Q Had you agreed, you and Mr. Landow, agreed to pay a commission to Mr. Bord?

A Yes. It was in the contract to be signed.

Q And what was the commission that you agreed to pay Mr. Bord?

A Seventy-five thousand dollars.

Q And was that commission to be paid at the settlement of the transaction?

A From memory I believe that the Bender transaction was an all cash settlement and the commission was to be paid. But I don't know if that's a fact.

Q After the Bender settlement failed did you make any other efforts to dispose of your interest in the contract?

A Landow and I walked out of the Bender Office and I went my way and Landow went his way and Landow went to Wolman's office. And this was on Monday or Tuesday and by Friday Wolman agreed to buy the property.

* * *

25 Q And how much had you agreed to sell it to Wolman for over and above your purchase price?

A Eight hundred thousand dollars.

Q Which was the same price that you had agreed to sell it to the Benders?

A Correct.

Q And how was this to be paid to you?

A At settlement Landow and Brandt had advanced seven hundred fifty thousand dollars. We -- And this is from memory again, but I'm pretty sure it's correct. We were to get the seven hundred fifty thousand dollars and two hundred thousand dollars more.

* * *

A In essence we got back all the money that we had laid out and two hundred thousand dollars more. Now, whether the seven hundred fifty thousand dollars is the correct figure I can't vouch for, but I think it is.

Q But in any event there was a six hundred thousand dollar unpaid deferred purchase price due from Wolman to Landow and Brandt?

A Correct.

Q And how was that represented?

A By a note due in two equal payments. One payment to be made in January and the following payment to be made a year later.

* * *

28 Q What was said at that meeting, Mr. Brandt?

A We went to lunch and we discussed the sale of the property and I indicated because of my friend-

ship with Arthur Hillman that I had previously agreed to pay my share of the seventy-five thousand dollar commission to Ned Bord that I would be willing to give that to Arthur Hillman.

Q And you agreed to pay thirty-seven thousand five hundred dollars to Arthur Hillman as a result of the sale to Wolman?

A Yes.

Q And your share of the seventy-five thousand dollars was one half, is that right?

A Yes.

* * *

31 Q Did you feel you owed Mr. Hillman thirty-seven thousand five hundred dollars when he told you he had presented the property to a person who was not the ultimate purchaser?

A Arthur Hillman said to me that he believed that he was instrumental in making this deal. And I agreed to a commission or a payment to Arthur Hillman.

Q And did you tell Mr. Hillman when you were going to pay him?

A Out of the last draw. Out of the last payment to me.

Q And when was the last payment to you supposed to come?

A January 1967. And again, I'm not sure of the year.

Q And did you pay him the thirty-seven thousand five hundred dollars in January of 1967?

A No. I didn't get my payment.

Q And did you ever get the final payment?

A Well, I'm not sure of the technicalities of that. I got the payment at a foreclosurewhere I
32 had to bid to protect my note. Now, whether that payment is from -- Whether that's considered a payment or considered a bid or whatever it's considered. I got the balance due me at a foreclosure sale.

" Q And did you intend to pay Mr. Hillman the thirty-seven thousand five hundred dollars from that foreclosure sale?

A I intended to pay the difference between the monies expended and thirty-seven five.

Q What monies expended are you talking about?

A That I had to protect myself at the foreclosure sale.

Q What monies were they, Mr. Brandt?

A I really don't have a list of them."

* * *

33 Q Now, did you ever communicate to Mr. Hillman that you were going to pay him the thirty-seven thousand five hundred dollars less your expenses?

A From that period on --

Q From what period on?

A From a period shortly after we had lunch at the Mayflower it appeared that Arthur Hillman stepped out of it and Melnick stepped into it. So that any communications that I got, although it was not my choosing and I tried to discourage it came from Melnick.

Q Well, did you communicate to Mr. Melnick that you were going to make these arrangements to pay the difference between thirty-seven five and what you had expended to protect yourself as you classified it?

A About a month to six weeks prior to the settlement -- prior to the foreclosure sale I communicated this to Melnick.

34 Q How did you communicate it to him, Mr. Brandt?

A Phone call. He called me.

Q And did you ever talk to Hillman about it at all?

A No.

Q Did your relationship with Hillman change from the time you originally had this lunch meeting with Mr. Melnick?

A Yes, our relationship has changed.

Q And it changed at the time you had these

conversations with Mr. Melnick. Did you feel you would rather talk to Mr. Melnick or talk to Mr. Hillman about that?

A No, not at all. I had considered Arthur Hillman probably my closest friend. Our relationship today or in the past year is not one of being the closest of friends, however, we are very friendly.

Q When you had the conversation with Mr. Melnick you at all times referred -- told Mr. Melnick you were going to pay Mr. Hillman the money, is that right?

A We never discussed who we were going to pay or who we weren't going to pay.

Q Do you recall getting -- ever getting any -- receiving any letters from Mr. Melnick concerning the arrangements which he claimed he made with you?

35 A I got a letter stating -- and from memory. -- that his bank required him to have a signed copy or something. And when I got it I threw it away.

* * *

43 Q Did you when you were talking to Mr. Hillman state any conditions on which you would make a payment to him of thirty-seven thousand five hundred dollars?

A At that time we just discussed out of the last payment of Mr. Wolman to myself.

Q You didn't say anything about how you would make out with the transaction or anything of that

sort?

A Oh, I think he knew. I had disclosed everything to him about what we had paid for the piece of ground and what we had sold it for.

Q No, what I am asking you is did you tell him you would pay him thirty-seven thousand five hundred dollars if you made out all right?

A I don't really remember that.

Q You just told him you would pay thirty-seven thousand five hundred dollars out of the last payment?

A Right.

Q Now, did you make that statement to him because you were his friend and were prosperous or because you felt you owed him some money?

A I'm sure the friendship entered into it a great deal. I don't really remember what it was.

* * *

44 Q Now, did you ever at any time tell Mr. Melnick that you wouldn't pay him anything?

A No, I did not.

Q Did you talk with him on the telephone about this subsequently?

A I believe that from the time we had lunch until I got this letter in the mail or agreement in the mail we did not discuss it. After I got the

agreement in the mail I threw it away and we did not discuss anything about any commission until it appeared that there was going to be a foreclosure on the property.

Q Then what happened?

A Then he made several phone calls to me and that's when I told him that I would -- I was not going to pay him any money until I deducted what it cost me to collect my money.

Q Now, did -- Subsequently did you tell him that you felt that you owed Hillman money and not him?

A No.

* * *

[Caption Omitted in Printing]

Washington, D.C.

Thursday, November 6, 1969

Deposition of ROBERT MELNICK

* * *

3 Q Will you state your full name, please, Mr. Melnick?

A Robert I. Melnick.

Q What is your address?

A My residence?

Q Your residence.

A 8301 Melody Court, Bethesda, Maryland.

Q What is your occupation?

A Real estate broker.

Q Where is your office?

A 1029 - 15th Street, N.W., Washington, D.C.

Q Are you authorized to carry on a real estate broker business in the District of Columbia?

A Yes, sir.

Q Do you have a broker's license?

A Yes, sir.

* * *

8 Q Did there come a time when you were engaged by Mr. Lawrence H. Brandt to sell certain real estate in the District of Columbia, which you have described in your complaint as being assessed for taxes as parcels 21/45?

A Yes.

Q When was that?

A I imagine there were numerous occasions that he was aware that we were working on it.

Q I didn't ask you that, sir, please. When were you engaged by Mr. Brandt to sell this real estate?

A I wasn't engaged. I was not engaged by Mr. Brandt to sell this real estate.

Q Very good, sir.

MR. BECKELMAN: Let him finish his question.

THE WITNESS: I sure didn't finish it.

MR. NORDLINGER: All right.

THE WITNESS: I was not engaged by Mr. Brandt at the very outset of the deal. I was brought into the deal by a Mr. Arthur Hillman.

BY MR. NORDLINGER:

Q You were not engaged by Mr. Brandt to sell this real estate, is that correct?

A I got in the deal by Mr. Arthur Hillman calling me. The deal was brought to me through Arthur Hillman.

Q I will ask you again, if you were at any time engaged by Mr. Brandt to sell this real estate?

MR. BECKELMAN: I think he has already answered the question. I will object to the repetition. I think the witness has testified that he was brought into it as a broker to sell the real estate through Mr. Hillman.

THE WITNESS: I think Mr. Brandt was aware of it. He was made aware of it. He knew of it later on. He was made aware of it.

BY MR. NORDLINGER:

Q Were you engaged in writing by Mr. Brandt?

A No, sir.

Q Were you engaged in writing by Mr. Hillman?

A No, sir.

Q Now, when did you first become --

A When you say in writing, you mean was I engaged with a contract to do it?

Q Correct.

A Yes.

Q A letter contract listing, or any other writing?

A No.

* * *

Q What else did you do?

A Right after that, when Wolman agreed to a deal with Landow, he informed me of it. At the time I told him that we had presented it to Toplin. And he said, as far as he was concerned, he was going to honor my position in the deal.

Q Who said this?

A Mr. Wolman.

Q To whom?

A To me. He said he was going to honor my position in

the deal, and I reported this at the time back to Mr. Hillman who I had my contact with at the time. This was my contact in regard to this particular deal.

Q Who was?

A Mr. Arthur Hillman was my contact.

Q Mr. Wolman told you that he would honor your position, or did Mr. Wolman tell Mr. Hillman this?

A As a matter of fact, he went a little further: he would not make the deal, he would not go through with the deal unless I was taken care of in my commission in this particular piece.

Q Mr. Wolman told you this?

A That is right.

Q Or he told it to Mr. Hillman?

13 A No. He told it to me.

Q All right.

* * *

Q Did you know Mr. Brandt?

A Yes, sir.

Q Did you ever have any conversation with Mr. Brandt before you went to see Wolman?

A In regard to what?

Q For authority to sell this property.

14 A No, sir.

Q Did you have any conversation with Mr. Landow before

you went to see Mr. Holman?

A ~~Not in regard to this piece,~~ no.

* * *

Q So, what you mean, when you say that Landow made no claim, you mean to say that Landow denied your claim?

A He denied our claim, okay.

Q All right.

A Then there was a terrible argument. Arthur Hillman, Mr. Brandt and myself went into Mr. Brandt's office at the time. Brandt sat us down. He said, "Calm down." This was after the argument when we left Landow's office. He said, "Calm down."

He made a number of requests of us, one of which he said he did not want anything to break up this deal. He said he just did not want anything to happen to break up this deal. He asked us not to break the deal up, number one.

Number two, he asked us to please go along with him, let the contract be signed, and right after the contract was signed he would make arrangements to take care of us. And also then we arranged to have some meeting right after the contract was signed.

Q Now, did he make these statements to you, Mr. Brandt, or did he make these statements to Arthur Hillman?

A He made them to myself and to Arthur Hillman, in his office, right after we walked out of Landow's office.

* * *

Q Now, did there come a time subsequent to this date, between these two important Jewish holidays, that you had any other meeting with Mr. Brandt?

A I don't remember any other meeting. A meeting with Mr. Brandt prior to --

Q I said, after these holidays.

A After the holidays, I am sorry. We sure did. Right after the contract was signed, and I think the contract was signed around October 19th or the 17th, around that time. Right after that a meeting was arranged with Mr. Brandt, Mr. Arthur Hillman and myself. We had lunch at the Mayflower Hotel, and at that time we agreed to a $37,500 commission. And the way that came about was that he had a deal pending with Zander that fell through. The commission was $75,000. He felt that since he was breaking up, or whatever it was, one-half of it, $37,500, this is what he obligated himself to for us.

Q Now, did he make this promise to you or make this promise to Mr. Hillman?

A He made it to the two of us.

Q Jointly?

A Yes, sir, at the luncheon at the Mayflower Hotel.

Q Now, the total amount of the commission that he promised you at that time was $37,500?

A That is right, sir.

Q And this was a promise made to Mr. Hillman and to you

jointly?

A Yes, sir.

Q How much of this commission does Mr. Hillman get?

A Half of mine, half of the $37,500.

Q So you are entitled to only one-half of $37,500 and Mr. Hillman is entitled to half of $37,500?

A Yes, sir.

Q How does it happen that you brought the suit for the whole amount?

A I am the broker in the transaction and I just handled the whole transaction. Being the broker, I guess I just handled it that way.

Q Does Mr. Hillman have a broker's license?

A I am not aware of him having one, but I think, as an attorney, he has a right to a real estate transaction.

Q Are you familiar with the Washington, D.C. real estate law which prohibits an attorney from engaging in a single transaction for a real estate commission without a license?

A No, sir.

Q So at the most, then, you were entitled only to $18,750, is that right?

A Yes, sir.

Q And you are bringing this suit for yourself and Mr. Hillman?

A Yes, sir.

Q Is he aware of it?

A Yes, sir.

Q Did he authorize you to do that?

A Yes, sir.

Q When and where did you have a conversation with him in which he authorized you to do this?

A When?

Q Yes, sir.

A I guess we had it in his office prior to the foreclosure that was to take place. I mean, it was Wolman's foreclosure that was brought about by Brandt, et al., on the property just prior to it.

Q Now, going back to the conversation in December of 1965, regardless of to whom the statement was made, isn't it a fact that Mr. Brandt said that he would pay the $37,500 out of the last payment from Wolman?

A No, sir. On the contrary. It never came up at that time.

Q When did it come up?

A When we made the deal, the $37,500 was to come out at the time of settlement on the contract, in December. It was some time in December of '65, the time of the settlement, and we were to get our $37,500 from Mr. Brandt.

Q Isn't it a fact that at the time you had this luncheon

the contract with Wolman had already been settled?

A Yes, sir.

Q So it was not to come out of that?

A No. It was to come out of the settlement in December. They only signed the contract in October.

Q Isn't it a fact that the contract with Wolman had already been settled and the cash part of the money was paid at the time you had this luncheon with Mr. Brandt at the Mayflower Hotel?

A If I remember correctly, I think we had the meeting with Mr. Brandt at the Mayflower right after the contract was signed, but it was not settled. The settlement, I think, took place in December. The money passed in December.

Mr. Brandt called me and asked me to please wait until the first payment on the contract was made, which was to be some time in January of 1966 -- which was just a couple of weeks after the closing date -- because he had some tax problems, he claimed.

Q Did he call you?

A He called me.

Q Or was it Mr. Hillman?

A He called me.

Q Was this in response to a call you made to him?

A Evidently it may have been the return back of a call. It might have been. I could have called him.

Q Now, when was this promise made to payyyou in January 1967?

A When was this promise made to pay me in January of '67? You said '67?

Q Yes.

A Oh, I see what you are saying.

21 MR. NORDLINGER: Off the record.

(Discussion off the record.)

MR. NORDLINGER: Back on the record.

THE WITNESS: In 1966, January, the first payment was to be made. We were asked to hold off until this first payment, which we agreed to do. In January of '66, when we did not receive a payment, I sent a letter to Larry Brandt outlining, for my accounting purposes, tax purposes, it was at the time, the commission arrangement and asked him to sign it and return it, which he did not do. I called him at the time right after that. I called him and he said, "We really don't need an agreement of this nature. You have a deal with me. And you are aware of it, you and Arthur, that you have a deal with me." Whenever I say "you," he was always aware 100 percent that Arthur Hillman was my partner in the deal. "You have a deal with me and you don't need this thing signed."

Right after that there was a payment to be made and he asked us at that time to hold off until whatever the date was of that last payment that was supposed to be made. I think

it was the one you referred to, in January of '67. He asked us to hold off on that. I committed myself to it. I said that I would.

When I told Arthur Hillman about it, who was out of
22 town at the time, he was quite disturbed with me. But he said, "That since you made the commitment" he was going to go along with it because we had waited an awful long time up until this time. It was extended for almost another -- I forget the time -- it may be close to another year.

Q Now, when did Mr. Brandt promise to make this payment to you on January the 10th, 1967?

A Right after I called him, when I did not get an answer to my letter.

Q Now, to summarize your testimony on this point: Is it correct to say that before the contract with Wolman, which Landow and Brandt had, was settled, Brandt agreed to pay you and Arthur Hillman $37,500?

A No, sir, I did not say that. He did not agree at that time. He agreed to pay the amount of $37,500 after the contract was signed.

Q Settled?

A After the contract was signed October 19th. This was signed at that time. We met with him right after that.

Q And between October the 19th and the date of the settlement of the Wolman contract --

A We met with him for lunch.

Q -- he promised to pay $37,500?

23 A Yes, sir.

Q Right after the contract was signed, settled?

A At settlement.

Q At settlement?

A After settlement. We never pinned it down to at or after.

Q You took this to mean January of '66?

A No. I took it to mean December 1965.

Q And there came a time when you made a demand on Mr. Brandt, and he then told you that he would pay it in January of 1967?

A '66.

Q And then he did not pay it in January of '66?

A That is right.

Q And then there came a time when he said he would pay it in January of 1967?

A That is right.

Q And all of this was oral, it was never in writing?

A Yes, sir.

Q Now, before you went to see Mr. Wolman with Mr. Hillman, what work did you do on investigating this piece of land?

A I did none.

Q How long did you meet with Mr. Wolman?

24 A He did not meet with Mr. Wolman. We met with Mr. Sidney Teplin.

Q You never met with Mr. Wolman?

A No.

Q I must be mistaken in my recollection of your testimony. You met with Mr. Teplin?

A That is right.

Q How long did you meet with Mr. Teplin?

A I imagine it took about a couple of hours.

Q Did you spend any more time than a couple of hours on your efforts to sell this contract?

A Yes, I did. I spent time after that. I believe I received some calls. Or I might have called Mr. Brandt, while the contract was being written, for certain information that Mr. Wolman wanted me to check out for him at the time in regard to the contract.

* * *

26 Q From the time you did this, in October or November and December of 1965, where was your office for the transaction of real estate business?

A I think it was in Jefferson Place, N.W.

Q Where was Mr. Wolman's office?

A In Silver Spring, Maryland.

Q You say that you spent 90 percent of your time in Mr. Wolman's office?

A Yes, sir.

Q What were you doing there?

A I was a broker and I used to present various deals. And I made a lot of real estate transactions with Mr. Wolman.

Q During the time that you were in Mr. Wolman's office, did you devote this 90 percent of your time that you are talking about to this contract?

A I don't believe so.

Q Well, how much time did you spend on this contract?

A I don't know offhand.

Q Was it two hours, 10 hours or 20 hours?

A I just don't know.

* * *

Q So the only effort that you put in on this sale was the 2-hour conference with Mr. Taylin and several telephone conversations with Mr. Brandt?

A Right.

Q Or did those telephone conversations with Mr. Brandt occur subsequent to your conversation with Landow and Brandt?

A They did not.

Q Can you estimate the time that you expended in this short period?

A I can't.

Q Would you know whether it was 10 hours, 20 hours, 2 hours or 3 hours?

A If I could, I would have told you the first time with-

out you starting to get around it in another way. I mean, regardless of how you ask the question, offhand I can't remember how much time it took at the time.

* * *

Washington, D.C.

Thursday, November 13, 1969

Deposition of SIDNEY KAPLAN

* * *

Q Now, inviting your attention to a tract of land on Massachusetts Avenue, N.W., opposite the Embassy, I think that is right, or the Greenbrier, up toward Wood Circle, commonly called the Glover Tract, did there come a time when someone presented that property to you for possible purchase?

A Yes, sir. I don't know if the word presented to propose for purchase, but Mr. Melnick did.

Q What word would you use?

A It was introduced to me in a manner by which Mr. Melnick came up to my office, if I remember correctly, on a late Friday afternoon and mentioned to me that he had an excellent deal for Jerry. And I told him that Jerry was out in Chicago at that time. Do you want me to continue to explain?

Q That would be nice.

A I told him that Jerry was in Chicago at the time, but I would like to listen to it. And he had a plat with him, he had some numbers with him on a yellow piece of pad paper. We went over the thing. And I thought it was very interesting. And at that time, I would say about possibly an hour later, I did get a call from Jerry Wolman in Chicago. I mentioned to him that Mr. Melnick was in the office, that he had a nice deal

for him, that I liked it, that I didn't know how the numbers would work out but the location, in my opinion, was the best that I knew of in the area. And he said, "Fine. When I get back we will go over it." And that is the way we left it.

Q How long did this conversation last?

A On the telephone?

Q No. With Mr. Melnick.

A I would say possibly close to an hour. It was a presentation, and the fact that he had a plat, he had the numbers and he showed me the area.

Q Did you ask him if he had any authority from the owners to sell it?

A I didn't ask him. He told me a little bit about it. However, he represented Lundow & Brandt, and the reason he was up there was that a deal that was pending fell through. I think it was with the Dumbos. And he thought it was an excellent opportunity for Jerry, so he did present it.

Q Was he by himself when he came up that day?

A No, sir. He was with Arthur Millman, an attorney.

* * *

Q All right. And is that all you know about it?

A About this tract of land?

Q Yes.

A Yes, sir. Well, I know a little more. I know what happened in the future after that conversation.

Q All right. What happened?

A I said to Melnick, after the conversation on the phone, that Mr. Wolman, he would be in over the weekend and we would go over it, he would go over it with me. And it happened to be a Jewish holiday at that time. I got back to my office, and I think it was on a Wednesday, three days later, that Jerry Wolman told me, I think this is the way he put it, that he actually bought the treat, because he had a visit from Nathan Landow over the weekend, made a deal with him and mentioned this Glover Tract.

And I said, "Well, that is fine, because that is the same piece of ground I talked to you about on Friday."

He said, "Yes, I know."

We even discussed Mr. Melnick at the time. He said he knows Shmuel Melnick is the broker, that he would protect him, which he does in all cases. From my knowledge, I presumed that he had taken care of that, that it was taken care of. That was the last I heard about the deal.

* * *

Washington, D.C.

Monday, November 13, 1967

Deposition of JIMMY HOLMAN

* * *

Q Inviting your attention to the end of the year 1965, roughly during the period of September 1965, did there come a time when there was submitted to you for acquisition a contract then owned by Nathan Landow and Lawrence Brandt covering a tract of land on Massachusetts Avenue up near Naval Chapel.

A I am not positive what names the contract was in. If you have a copy of the contract, I could look at it. But I did deal with Nathan Landow and Larry Brandt for the purchase of the contract involving that piece of property.

Q Do you recollect approximately when the Landow-Brandt contract was first submitted to you?

A I believe that the contract was first submitted to me while I was in Chicago. I was in Chicago on the matter of the Hancock Center and I got a call from Sidney Kaplan, who told me that Bob Malnick -- and I believe the attorney's name who used to be with Neal, Artie Willens -- who do the tables and that they had this particular piece of property on Massachusetts Avenue, and they wanted to submit it. And I asked them to get all the facts from them.

I think that was the first time I was approached about the piece of property.

Q Now, did there come a time thereafter when Nathan London came to see you about that contract?

A Bernie, I don't really remember whether it was Nate London or Larry Brandt that came to see me. Either one or the other did. I seem to think that I dealt mostly with Larry. I am not at this point 100 percent positive. I think there had been occasions when I met with both of them on the particular piece of property.

Q About how long a time, after you first saw either London or Brandt, was it before you shook hands on an indication that you would buy their contract?

A Again, going from memory, sir, I think it was a rather short period of time. I don't think it could have been too long.

* * *

Q Would it refresh your memory any if I told you, subsequent to October 19th, after the contract was signed, in 1965, that a discussion ensued in the office of London and Brandt and that Mr. Molnick was told that there would be no discussions of commission until after this contract was performed.

A I really have no knowledge of that. I only had one concern, Bernie, unless you want me to just satisfy with your questions, and that would be that Bob Molnick and London and Brandt came to a sort of an arrangement, because I was not interested in tying up a piece of property and getting into the middle of a legal matter.

As a matter of fact, I would have dropped the property had it come to that. I have done that in the past times there were problems with real estate agents, because I have always dealed with real estate agents and paid them, but I was assured by both Larry and Bob that they had reached an understanding.

Q Do you recollect when that assurance was communicated to you?

A I can't give you the exact date. It is somewhere before settlement.

Q What you say before settlement, you mean before you actually closed on the acquisition of the real estate?

A No. I think before the signing of the contract, and then I think I was further assured, at a meeting in my office, that it would be taken care of at settlement. I don't really recall too much about the whole thing, Dennis. It has been four years ago and there have been a lot of things that have happened in the past four years.

Q But you were informed that the commission would be paid to Mr. Helmick at settlement?

A I can't say that that would be exactly right, Dennis. I was informed that they had an understanding, that they had reached an agreement and that I did not have to be concerned about it.

Q Who informed you of that?

A Larry Brandt and Bob Helmick both informed me.

* * *

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1054

ROBERT MELNICK,

Appellant,

v.

LAWRENCE N. BRANDT,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This appeal is from an Order of the United States District Court for the District of Columbia entered on June 2, 1970, granting Appellee's Motion for Summary Judgment dismissing Appellant's complaint. The judgment became final and appealable on December 9, 1970, when Appellee's

counter-claim against Appellant was dismissed pursuant to stipulation between the parties. Jurisdiction of this Court is conferred by Title 28 of the United States Code and Rule 54 of the Federal Rules of Civil Procedure.

REFERENCE TO PARTIES AND RULINGS

Appellant, Robert Melnick, was the plaintiff below. Appellee, Lawrence N. Brandt, was the defendant below. On June 2, 1970, Judge Howard F. Corcoran, United States District Court Judge, granted defendant-Appellee's Motion for Summary Judgment dismissing plaintiff-Appellant's complaint.

STATEMENTS AND ISSUES PRESENTED FOR REVIEW

The Court below erred in granting appellee's Motion for Summary Judgment, as there were genuine issues of fact properly raised by appellant directed to the issue of the applicability of the statute of limitations which required a full hearing on the merits.

This case has not previously been before this Court under the same or similar title.

STATEMENT OF THE CASE

The appellant, Robert Melnick, a licensed real estate broker in the District of Columbia, brought this action on July 25, 1969, to recover a commission from the appellee, Lawrence Brandt, as a result of the sale of a contract to purchase a large tract of land on Massachusetts Avenue, N.W. (J.A. 1)

An Answer and Counterclaim was filed by appellee on August 20, 1969. Thereafter, discovery was made by both parties, and appellee filed a Motion for Summary Judgment, together with supporting Points and Authorities, on January

6, 1970. On June 2, 1970, after oral argument, the court below granted appellee Brandt's Motion to dismiss appellant Melnick's complaint on the sole ground that the applicable statute of limitations barred the claim.

On December 9, 1970, the parties stipulated as to the dismissal of the counterclaim, and this appeal followed.

Brandt and a partner were the contract owners for the purchase of a large tract of land on Massachusetts Avenue, N.W., having purchased the contract from another group in May of 1965 for a price of $5,300,000.00. (J.A. 32) Brandt and his partner negotiated a proposed sale of the property through a Mr. Ned Bord to the Benders for a profit of $800,000.00 over the $5,300,000.00, pursuant to which sale a commission of $75,000.00 was to be paid to Mr. Bord. This sale was never consummated. (J.A. 32, 32a)

Subsequently, Brandt authorized Arthur J. Hillman, an attorney and his close friend, to have Melnick present the property to Mr. Jerry Wolman as a prospective purchaser. (J.A. 23) Pursuant to this authority, Brandt gave Hillman a plat and some written notes concerning the financial terms of the sale of the contract. (J.A. 23) Melnick thereupon presented the deal to Wolman's business associate, and at this time Mr. Wolman was contacted by long distance telephone call. (J.A. 55, 56, 58) It subsequently developed that Brandt's partner, Mr. Nathan Landow, consulted directly with Wolman and made a tentative deal for the sale of the contract at the price of $800,000.00 over the $5,300,000.00 price they had paid, being the same terms that had been previously negotiated for the sale to the Benders. (J.A. 23, 32, 32a, 57)

Wolman then executed a contract of sale with Brandt and Landow only after he had been assured by Brandt that Melnick's commission would be provided for. (J.A. 57, 59, 60) In or about October 1965 Brandt, in the presence of Melnick and Hillman, agreed to pay a commission of $37,500.00 to Melnick, payable no later than January 1967,

which was the time set for Wolman to make the final payment on the deferred purchase price of the contract. (J.A. 24, 25, 32a, 34, 35)

The deferred purchase money due from Wolman to Brandt and Landow was never fully paid by Wolman. Thereafter, during 1969, there was a foreclosure on the property, and as a result of the sale there was sufficient surplus to pay the remaining balance due to Brandt and Landow. (J.A. 35) Melnick issued a writ of attachment before judgment based on the non-residency of Brandt and attached the proceeds due to Brandt from the foreclosure sale which were in the hands of the trustees. (J.A. 3)

Brandt moved for summary judgment on the grounds that he orally agreed to pay the commission in January 1966 and that since the action in the court below was not filed until July 25, 1969, that Melnick's claims were barred by the statute of limitations in effect in the District of Columbia. Objection to said motion, including an affidavit from Hillman and the depositions of Brandt, Wolman, and Sidney Teplin, were presented. The opposition urged that the commission was actually due in January 1967; that Brandt had promised to pay the same in the presence of Hillman; and that even if the agreement required payment in January 1966, that the statute was tolled and Brandt was estopped to raise that defense. (J.A. 18, 19, 20)

ARGUMENT

It is noteworthy to observe that in filing his Motion for Summary Judgment Brandt advanced two distinct theories. One was directed to the fact that Melnick had no written listing agreement from Brandt for the sale of the property involved, to which contention the court below made no findings. The second argument advanced was that the statute of limitations under § 12-301(7)(8) District of Columbia Code, 1967 edition, barred the claim, and it is upon this contention that the court entered its order dis-

missing Melnick's claim. The memorandum submitted in support of Brandt's motion cited no legal authority to support his claim that the three (3) year statute of limitations barred the action, and the thrust of the memorandum was directed to the remaining contention dealing with lack of a written listing.

The factual references to Melnick's deposition that the commission was to be paid in December of 1965 or January 1966 are found in Melnick's deposition where he testified as follows: (J.A. 47)

> "Q. Now, going back to the conversation in December of 1965, regardless of to whom the statement was made, isn't it a fact that Mr. Brandt said that he would pay the $37,500 out of the last payment from Wolman?
>
> "A. No, sir. On the contrary. It never came up at that time.
>
> "Q. When did it come up?
>
> "A. When we made the deal, the $37,500 was to come out at the time of settlement on the contract, in December. It was some time in December of '65, the time of the settlement, and we were to get our $37,500 from Mr. Brandt."

Melnick also testified at his deposition as follows: (J.A. 49)

> "In 1966, January, the first payment was to be made. We were asked to hold off until this first payment, which we agreed to do. In January of '66. when we did not receive a payment, I sent a letter to Larry Brandt outlining, for my accounting purposes, tax purposes, it was at the time, the commission arrangement and asked him to sign it and return it, which he did not do. I called him and he said, 'We really don't need an agreement of this nature. You have a deal with me. And you are aware of it, you and Arthur, that you have a deal with me.' Whenever I say 'you,' he was always aware 100 percent that Arthur Hillman was my partner in the

deal. 'You have a deal with me and you don't need this thing signed.'

"Right after that there was a payment to be made and he asked us at that time to hold off until whatever the date was of that last payment that was supposed to be made. I think it was the one you referred to, in January of '67. He asked us to hold off on that. I committed myself to it. I said that I would."

The sole thrust of this argument was alleged by Brandt to establish the fact that the agreement between the parties for the payment of the commission provided that the said commission was payable in December of 1965 or January of 1966. It is undisputed that the agreement which was made between the parties took place at a luncheon meeting at the Mayflower Hotel in November or December 1965, at which time Arthur Hillman was present with both Brandt and Melnick. At that time, pursuant to the affidavit signed by Hillman in opposition to the Motion for Summary Judgment, the record contains the following statement of fact by Hillman: (J.A. 24, 25)

"Subsequently, I attended a luncheon meeting with plaintiff and defendant at the Mayflower Hotel, during which meeting the defendant agreed to pay a commission to the plaintiff of $37,500.00. The defendant agreed to make the payment on the date that the last payment was due from Mr. Wolman on the deferred purchase money *which had been set for January 1967* . . ."

In addition to the foregoing, Melnick had testified by deposition and verified the affidavit of Mr. Hillman, i.e., that the commission would be payable out of the last payment from Mr. Wolman in January 1967. It is interesting that although Brandt disputed that he agreed to pay a commission to Melnick, he did not dispute that the *time of payment* was to be in January 1967. Brandt testified at deposition as follows: (J.A. 34, 35)

"Q. What was said at that meeting, Mr. Brandt?

"A. We went to lunch and we discussed the sale of the property and I indicated because of my friendship with Arthur Hillman that I had previously agreed to pay my share of the seventy-five thousand dollar commission to Ned Bord that I would be willing to give that to Arthur Hillman.

"Q. And you agreed to pay thirty-seven thousand five hundred dollars to Arthur Hillman as a result of the sale to Wolman?

"A. Yes."

Brandt further testified as follows: (J.A. 34, 35)

"Q. And did you tell Mr. Hillman when you were going to pay him?

"A. Out of the last draw. Out of the last payment to me.

"Q. And when was the last payment to you supposed to come?

"A. January 1967. And again, I'm not sure of the year.

"Q. And did you pay him the thirty-seven thousand five hundred dollars in January of 1967?

"A. No. I didn't get my payment."

Additionally, Brandt acknowledged that he had received and thrown away a letter from appellant containing the following language:

"Please sign the copy of this letter and return to me which will signify you owe me a commission of $37,500.00 which is due and payable on January 10, 1967, or earlier, if you receive your final payment from Jerry Wolman before January 10, 1967, in this sale." (J.A. 37)

This agreement between the parties for the payment of the commission was also set forth in paragraph 5 of the complaint:

"That on or during November 1965 the defendant agreed to compensate the plaintiff as and for his commission in effecting this sale above-described in

> the sum of $37,500.00 to be paid no later than January 10, 1967." (J.A. 2)

Apparently the sole issue considered by the trier of fact was whether or not the commission was agreed to be paid in January 1966 or January 1967. Melnick contends that there was sufficient evidence in the record as to this point which created a genuine issue of fact and that a hearing on the merits was required. When Brandt and his partner sold their rights to the contract to purchase the Massachusetts Avenue property to Wolman, part of the deferred purchase price was represented by Wolman's promissory note which was required to be paid in two equal installments of $300,000.00 in January 1966 and January 1967. Wolman had, at the settlement on the sale of the property itself, paid to Brandt and his partner $200,000.00 in cash over the amounts that they had previously paid for the contract themselves, in addition to the said promissory notes. (J.A. 33) Brandt testified in this connection as follows:

> "A. In essence we got back all the money that we had laid out and two hundred thousand dollars more. Now, whether the seven hundred fifty thousand dollars is the correct figure, I can't vouch for, but I think it is.
>
> "Q. But in any event there was a six hundred thousand dollar unpaid deferred purchase price due from Wolman to Landow and Brandt?
>
> "A. Correct.
>
> "Q. And how was that represented?
>
> "A. By a note due in two equal payments. One payment to be made in January and the following payment to be made a year later."

It is axiomatic that in ruling on a Motion for Summary Judgment the court's function is to determine whether a genuine issue exists and *not to resolve any existing factual issues;* (6 Moore's Federal Practice, 2281) since, as hereinabove set forth, there was a conflict in the events, there arose an obvious dispute as to an existing factual issue,

and since the pertinent date was not undisputed according to the totality of the record before the court below, the granting of the summary judgment was erroneous.

The leading case in this jurisdiction is *Dewey v. Clark*, 180 F.2d 766, 86 U.S.App.D.C. 137, wherein the following summary of the law is set forth:

> "Our study of the question makes the following points clear: (1) Factual issues are not to be tried or resolved by summary judgment procedure; only the existence of a genuine and material factual issue is to be determined. Once it is determined that there is such an issue summary judgment may not be granted; (2) In making this determination doubts (of course the doubts are not fanciful) are to be resolved against the granting of summary judgment; (3) There may be no genuine issue even though there is a formal issue. Neither a purely formal denial nor, in every case, general allegations, defeat summary judgment. On this point the cases decided by this court must rest on their own facts rather than upon a rigid rule that an assertion and a denial always preclude the granting of summary judgment. Those cases stand for the proposition that formalism is not a substitute for the necessity of a real or genuine issue. Whether the situation falls into the category of formalism or genuineness cannot be decided in the abstract; (4) If conflict appears as to a material fact the summary procedure does not apply unless the evidence on one or the other hand is too incredible to be accepted by reasonable minds or is without legal probative force even if true; (5) To support summary judgment the situation must justify a directed verdict insofar as the facts are concerned."

The court, in the same case and citing *Miller v. Miller*, 74 App.D.C. 216, 122 F.2d 209, stated:

> "The purpose of this rule is to dispose of cases where there is no genuine issue of fact even though an issue may be raised formally by the pleadings . . .

> the court is not authorized to try the issue, but is to determine whether there is an issue to be tried."

Then citing *Whitaker v. Coleman*, 115 F.2d 305:

> "It must appear that there is no substantial evidence on it [the tendered issue], that is, either that the tendered evidence is in its nature too incredible to be accepted by reasonable minds or that, conceding its truth, it is without legal probative force."

Again, in *Davidson v. Coyne*, 347 F.2d 471, 120 U.S. App.D.C. 377, Chief Justice Burger, then Circuit Judge, in reversing the lower court in a case dealing with the services of a real estate broker in violation of the licensing statute stated the following:

> "The issue on appeal is not whether appellant can establish the truth of all facts essential to a recovery but narrowly whether the pleadings and other matter relevant to the motion for summary judgment, considered most favorably to appellant, raise genuine issues of fact."

The rule was also announced by this court in *Edwards v. Mazor Masterpieces, Inc.*, 295 F.2d 547, 111 U.S.App. D.C. 202, wherein the court reversed a summary judgment that had been granted against plaintiff in a wrongful death case citing other authorities and stating the following:

> "The rule 'authorizing summary judgment only where * * * it is quite clear what the truth is, * * * the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try.'" "And 'doubts as to the existence of a genuine issue of material fact must be resolved against the party moving for summary judgment.'"
>
> "In this case 'the pleadings, depositions, and on file together with the affidavits' do not make 'clear what the truth is.'"

It is further submitted that notwithstanding the contention, as only inferred from Melnick's testimony, that the commission was originally due to be paid in January 1966,

that any delay in enforcing the claim by bringing of suit was induced by promises, or representations of Brandt and that Brandt is accordingly estopped from pleading the statute of limitations. The resolution of this contention is, as set forth above, a material and genuine issue of fact which should be tried.

The testimony of Melnick reveals that he did not receive the commission in January of 1966 when Wolman was required to make the first payment to Brandt. He further testified that in January 1966 he sent a letter to Brandt setting forth that the commission was due in January 1967, and confirmed this fact through a telephone conversation with Brandt in which Brandt stated "We really don't need an agreement of this nature. You have a deal with me. And you are aware of it, you and Arthur, that you have a deal with me." (J.A. 49)

In *McCloskey v. Dickenson*, 56 A.2d 442, the then Municipal Court of Appeals for the District of Columbia ruled that ". . . one cannot by words or conduct induce inaction on the part of a creditor and then when the creditor sues attack his suit on the ground that it was filed too late."

Hornblower v. George Washington University, 31 App. D.C. 64, was cited as authority for the McCloskey decision, and the court therein stated:

> "We think it is a well settled principle that a defendant cannot avail himself of the bar of the statute of limitations if it appears that he had done anything that would tend to lull the plaintiff into inaction and thereby permit the limitations prescribed by the statute to run against him."

The facts as set forth above, all of which was contained in the record before the court below, again create material genuine issues of fact with respect to estoppel, i.e., whether any alleged promises by Melnick to extend the time for payment or not to press for payment, and Brandt's acceptance thereof, tolled the statute.

CONCLUSION

Appellant submits that the court below erred in granting appellee's Motion for Summary Judgment, and accordingly the decision of the court below should be reversed and the cause remanded for the purpose of a full trial.

Respectfully submitted,

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IN THE

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FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Appellant,

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Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

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BRIEF FOR APPELLEE

ISSUES PRESENTED FOR REVIEW

Plaintiff (appellant) commenced suit in July 1969 against defendant (appellee) for a real estate commission claimed to have become due in December 1965 under an oral contract. Time for payment is claimed by plaintiff to have been twice extended orally until January 1966 and January 1967 respectively. (a) Did the trial court properly grant sum-

mary judgment for defendant on the ground that the 3-year Statute of Limitations (§ 12-301 [7] [8] D.C. Code, 1967 ed.) bars the claim of plaintiff? (b) Were any facts in dispute which would estop defendant from claiming the Statute of Limitations as a bar?

RESTATEMENT OF THE CASE

Plaintiff (appellant) claims that in or during November 1965, defendant (appellee) agreed to pay plaintiff $37,500 as a real estate commission for effecting a sale of a real estate contract owned by defendant and one Nathan Landow (J.A. 1, 2; Plaintiff's Complaint, paragraphs 3, 4, 5).

Plaintiff was not engaged by defendant to sell the real estate contract (J.A. 41). Plaintiff was engaged by one Arthur Hillman (J.A. 41). Plaintiff was not engaged in writing by defendant nor by Mr. Hillman (J.A. 42). Mr. Hillman made the arrangements for plaintiff to present the possibility of sale to one Wolman on or about September 24, 1965 (Plaintiff's Deposition p. 10). Before plaintiff went to see Mr. Wolman, plaintiff had no conversation with defendant to obtain authority to sell the contract and had no conversation with said Nathan Landow, the other owner of the contract (J.A. 43, 44). Before the settlement of the sale of the contract, plaintiff had a conversation with defendant, plaintiff claims, at which time defendant asked that plaintiff let the contract be signed and that after the contract was signed, defendant would make arrangements to take care of plaintiff (J.A. 44).

After the contract was signed, about October 19, or 17, 1965, Mr. Hillman, plaintiff and defendant had a meeting at which time defendant agreed to pay plaintiff and Hillman a commission of $37,500 (J.A. 45) of which plaintiff claims to be entitled only to one-half, Mr. Hillman being entitled to the other half (J.A. 46) so that plaintiff is entitled only to $18,750 (J.A. 46).

Payment of the commission was to be made at the time of settlement of the sale of the contract in December 1965.

It was then that plaintiff claimed that defendant was to pay plaintiff $37,500 (J.A. 47). Plaintiff claimed that after the money for the sale of the real estate contract "passed in December" 1965, then defendant asked plaintiff to wait "until the first payment on the contract was made which was to be sometime in January of 1966", before making payment (J.A. 48, 49). Plaintiff took the arrangements to mean that defendant became obligated to pay plaintiff in December 1965, made a demand upon defendant who told plaintiff he would pay it in January 1966, and later according to plaintiff, defendant said he would make the payment in January of 1967. All of the arrangements were oral, never in writing (J.A. 51).

The affidavit of Arthur J. Hillman, to which plaintiff makes reference in his brief, is not inconsistent with plaintiff's own Statement or any of the foregoing and hence, there can be no genuine issue of material fact in respect of this restatement of the case here made by defendant. Furthermore, the case at bar attempts to present a claim of Mr. Melnick, not a claim of Mr. Hillman.

Plaintiff makes no claim that there is any evidence of action or request by defendant from January 1967 until suit was filed in July of 1969. Hence, there is no basis in the record for a claim that any action or request of defendant in any manner influenced plaintiff to wait a period of 30 months from January 1967 before instituting action. Plaintiff's claim for commission would be barred by the 3-year statute of limitations in December 1968, and certainly in January 1969. Thus, plaintiff cannot point to any action or request of defendant which caused *plaintiff to delay suit two years* from January 1967 until after the statute of limitations had run in December 1968 or January, 1969.

It is therefore plain that (1) ample time to file suit was available to plaintiff (about two years) within the statutory period from December, 1965, or from January, 1966, after plaintiff found that defendant did not make payment in

January 1967, (2) defendant took no action and made no request during that two-year period to delay suit by plaintiff, and (3) for that reason no estoppel against defendant's use of the 3-year statute of limitations may lawfully be interposed.

ARGUMENT

(a) The 3-Year Statute of Limitations Bars Plaintiff's Claim.

It is established beyond doubt that plaintiff claims an oral contract of the defendant which plaintiff did not seek to place in suit within three years from the date the obligation is alleged to have become due. The Statute of Limitations, § 12-301[7][8], D.C. Code, 1967 ed., limits the period to three years. This the plaintiff ignored in the institution of his complaint. The situation in the case at bar is no different from that in which a promissory note becomes due on one day and the maker orally promises the holder to pay at a later time. Under such circumstances the holder must bring suit within three years from the date the note became due, not within three years from the date on which the maker promised later to make payment.

(b) Defendant Is Not Estopped from Claiming the Statute of Limitations As a Bar.

No estoppel can possibly be held to bar defendant's reliance upon the Statute of Limitations. If it be taken to be a fact that defendant promised to pay plaintiff in January of 1967, after having prior thereto promised to pay plaintiff on other occasions, and since all of the alleged promises of defendant were verbal, none written, then plaintiff still had ample time after January, 1967 before the bar of the Statute of Limitations interposed, to initiate the action: "If ample time to file suit within the statutory period exists after the circumstances inducing delay ceased, there is no estoppel against pleading the bar of the Statute".

Property 10-F, Inc. v. Pack & Process, Inc., 265 F.2d 290 D.C. App. 1970). In the case at bar "the 'lulling' period ceased in" January 1967, "and there was ample time thereafter in which to bring suit within the statutory time. Under such circumstances the defense of the statute of limitations was not barred." *Property 10-F, Inc., supra.*

There is no genuine issue of material fact concerning the foregoing. If the case went to trial to a jury, a directed verdict would need to be entered at the close of plaintiff's case.

This appeal is almost frivolous.

CONCLUSION

There would seem to be no reason in law or logic to do more than enter a summary affirmance in the case at bar.

Respectfully submitted,

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